**Task Force on Judicial Candidate Campaign Conduct**
**Commission for Impartial Courts**

Judicial Council of California
JCCC Redwood Room
455 Golden Gate Avenue
San Francisco, California, 94102

October 10, 2008
10:00 a.m. – 3:00 p.m.

# Minutes

**Members present:** Hon. Douglas Miller, Chair, Ms. Christine Burdick, Hon. Joseph Dunn, Hon. Richard Fybel, Hon. Michael Garcia, Ms. Beth Jay, Hon. Ronni MacLaren, Hon. Rodney Melville, Mr. Sean Metroka, Hon. James Mize, Hon. Maria Rivera, Hon. Byron Sher, Mr. Alan Slater, and Hon. Nancy Wieben Stock.

**Members absent:** Mr. Thomas Burke, Mr. Dennis Herrera, Professor Mary-Beth Moylan, Mr. James Penrod, and Professor Kathleen Sullivan.

**Staff present:** Mark Jacobson, Committee Counsel, Sei Shimoguchi, Committee Counsel, and Jay Harrell, Administrative Coordinator.

**Consultant present:** Professor Charles Geyh

## 1. Introduction

Justice Miller welcomed the members and stated the objectives for the meeting. The members will vote on the recommendations presented by the White Working Group and the committees of the Best Practices Working Group. The final recommendations will be included in a report to the CIC Steering Committee.

## 2. Minutes

The members approved the minutes of the April 30, 2008 task force meeting.

## 3. Committee on Voluntary Judicial Campaign Codes of Conduct and Oversight Committees

Ms. Burdick (committee chair) presented the committee's recommendations.

a. Statewide campaign conduct committee

Questions presented

Should there be a statewide campaign conduct committee in addition to local conduct committees similar to the Santa Clara County Bar Association's Fair Election Practices Commission? If so, how would these committees be structured? And should there be a statewide standard of conduct separate from the provisions in the Elections Code and the Code of Judicial Ethics?

Discussion

One approach the committee considered is to have an official campaign conduct committee formed that would oversee judicial election campaigns at both the superior court and appellate court levels. This would push the limits of the *White* case but would arguably provide the most effective means of oversight. An official committee may be possible as long as it takes a speech versus speech approach and does not have disciplinary authority. An official committee could be formed by the Legislature or it could be kept within the judicial branch, which may be more effective. One possible drawback of placing this committee with the judicial branch is that it could be seen as judge protective.

The committee's preferred approach is that an independent, unofficial statewide campaign conduct committee be formed that would address campaign conduct in appellate retention elections and in superior court elections where no local oversight committee exists. The unofficial statewide committee would be independent of the State Bar and the judiciary and would have its own voluntary code of conduct to which it would try to persuade candidates to subscribe. It would handle questionable campaign conduct by a speech versus speech approach, i.e., it would speak with the participants about questionable campaign conduct and make public statements about that conduct if necessary. The unofficial statewide committee could also perform other functions such as educating the candidates about appropriate campaign conduct, educating the media and the public about judicial elections, and providing information about the candidates to the public.

The unofficial statewide campaign conduct committee could also possibly be merged with the statewide rapid response team under consideration by the Task Force on Public Information and Education whose function will be to respond to unfair criticism of, and attacks on, judges and the judiciary. On the one hand, merging these bodies could be problematic because their functions, although similar, are not identical. On the other hand, merger may be beneficial because it would create a standing committee with immediate responsibilities and would avoid having to reappoint a statewide campaign conduct committee whenever there is a contested retention election, which occurs very infrequently.

Action:

The task force makes the following recommendations:

- An independent, unofficial statewide campaign conduct committee should be created to address campaign conduct in appellate retention elections and in superior court elections in counties that do not have a local oversight committee. This committee should develop a model code of campaign conduct that would be aspirational rather than mandatory. This committee would also be responsible for educating judicial candidates, campaign managers, the public, and the media about judicial elections and appropriate campaign conduct. Training sessions should be open to the public.

- The following matters concerning the proposed unofficial statewide committee will be further addressed by the Committee on Voluntary Judicial Campaign Codes of Conduct and Oversight Committees:

    - Adding specific information about what the unofficial statewide body will do and how it will carry out its functions.

    - Naming the body to put an emphasis on its informational and educational functions.

    - Strengthening the body's relations with the media.

    - Developing ongoing relationships with the Commission on Judicial Performance and the State Bar.

    - Determining how to use being called the "speech police" to advantage (e.g., using this as a teaching point opportunity).

    - Determining who will sponsor and/or fund the new body (e.g., League of Women Voters, Judicial Council non-profit).

    - Membership of the new body.

- The unofficial statewide campaign conduct committee should, if possible, be merged with the rapid response team under consideration by the Task Force on Public Information and Education. (The task force voted 12–2 in favor of merger.)

- There should be additional discussion and consideration of forming a legislatively-authorized official statewide campaign conduct committee.

b. Issuing a resolution concerning judicial campaigns

Question presented:

Should the judiciary and/or the State Bar issue a resolution or statement regarding judicial campaigns, campaign conduct, and funding?

Discussion

The committee recommended against this idea as being ineffectual and subject to accusations of protectionism being made by the public and special interest groups. This type of information should instead come from independent oversight committees and through other channels of public information.

Action

The task force adopts the committee's recommendation against issuance of a resolution or statement by the judiciary or State Bar regarding judicial campaigns, campaign conduct, and funding.

**4. Committee on Campaign Contributions**

Judge MacLaren (committee chair) presented the committee's recommendations.

a. Disclosure requirements under canon 3E(2)

Question presented

Should canon 3E(2) be clarified regarding how sitting judges comply with campaign contribution disclosure requirements?

Discussion

The committee's starting point was Ethics Opinion No. 48 of the California Judges Association, which states that a judge should disclose campaign contributions of $100 or more when the contributor is involved in a case before the judge because this is the threshold figure for disclosure of campaign contributions under the FPPC requirements (Gov. Code, § 84211(f)). The committee considered larger amounts but ultimately agreed that the disclosure figure under canon 3E(2) should mirror the FPPC reporting requirement.

Concerning how long this disclosure requirement should last, the committee disagreed with the 2-year recommendation in opinion 48. (New CJA Ethics Opinion No. 60 states that when an attorney has contributed to a judge's campaign, but is not a major donor and did not work on the campaign, disclosure should continue for one year following the election.) The committee initially determined that the disclosure period should last for

one year except for "unusually high" contributions. However, because what is considered unusually high may vary from county to county, the committee determined to withdraw the exception for unusually high contributions and to instead recommend to the task force that the disclosure requirement should last for a minimum of one year.

The committee did not reach a consensus on the mechanics of how the disclosure should be made and presented options for the task force's consideration. Task force members expressed varying views on whether canon 3E(2)'s requirement of disclosure "on the record" could be satisfied by some means other than making disclosures in individual cases, such as by a general pronouncement by the judge or bailiff advising courtroom participants of where a list of campaign contributors could be located, or by posting a notice to this effect in the courtroom. One concern expressed was that requiring disclosure in individual cases would be overly burdensome on judges, particularly those in high volume assignments. Another concern expressed was that requiring disclosure in individual cases would result in politics being repeatedly injected into the courtroom. It was noted that these concerns need to be balanced against the need to provide adequate notice to litigants and attorneys. It was also noted by the task force members that a rule allowing disclosure by a general pronouncement or by posting a sign may not adequately address those situations where a significant campaign contribution has been made that falls between the $100 threshold and an amount that would require the judge's disqualification. For example, if a judge received a $1000 campaign contribution from an attorney, which the judge determines does not require his or her disqualification, should this contribution be disclosed on the record in cases involving the attorney?

Action

The task force recommends that the commentary to canon 3E(2) be amended to state:

- That a judge should disclose on the record the fact that an attorney, law firm, or party appearing before the judge has contributed to the judge's election campaign in an amount equal to or greater than the amount that must be reported to the FPPC (currently $100 under Government Code section 84211(f));

- That a judge's duty to disclose campaign contributions continues for a minimum of one year after the election;

- That a judge should maintain, with weekly updates, a list of contributors of $100 or more in the court clerk's office in the courthouse where the judge sits (not with the judge's courtroom clerk) and post the list on the court's Web site, if feasible.

    - The committee will develop additional language to be added to this requirement regarding the mechanism(s) for advising courtroom participants of the list; for instance, providing notice by posting a sign or by local rule. The committee will consider language indicating that notice should be given in a manner that takes into consideration that not all court hearings are held in the courtroom; thus, in some cases, posting a notice in

the courtroom or courthouse may not provide sufficient notice to the litigants. Also, the commentary should indicate that this is a minimum requirement for disclosure and that if a judge believes it is appropriate, the judge may provide additional information about the contribution on the record.

- The task force also recommends that the commentary to canon 5 be amended to add a cross-reference to the new proposed disclosure provisions in the commentary to canon 3E(2).

b. Setting a threshold amount for disqualification

Question presented

Should there be a rule mandating a judge's disqualification if an attorney, law firm, or party appearing before the judge has made a contribution to the judge's campaign of a certain amount?

Discussion

At the April 30, 2008 task force meeting, the committee recommended against setting a threshold amount for campaign contributions at which a judge's disqualification is mandatory. The committee's view was that Code of Civil Procedure section 170.1(a)(6)(A) provides adequate protection to litigants in terms of whether a campaign contribution requires recusal. However, because the task force was split on this issue at the April meeting, the committee was directed to prepare alternative recommendations on this issue for the October meeting.

After reconvening on this issue, the committee's preferred recommendation remains that there not be a rule setting a threshold amount for disqualification and that this issue should continue to be governed by section 170.1(a)(6)(A). The committee's alternative recommendation was that the threshold be set at $10,000, an arbitrary figure but one that would stand out to everyone as requiring disqualification.

Professor Geyh stated that California is so big it is difficult to come up with a figure that would apply to everyone and that it is unrealistic to try to set an amount without doing a statistical analysis. He suggested adding commentary to the disqualification rules indicating that campaign contributions are among the things judges should consider with an eye toward whether their impartiality might reasonably be questioned given the nature of the contribution.

The task force members discussed the duration of disqualification caused by a campaign contribution. Options considered were no additional disqualification period, 2 years, and the length of the judge's current term (the committee's recommendation). The members also discussed when the period of disqualification should commence, i.e., from the date of the contribution or the date the judge takes office.

Action

The task force makes the following recommendations;

- There not be a rule setting a threshold amount for campaign contributions that would trigger a judge's disqualification.

- Add commentary to canon 3E to indicate that campaign contributions are among the things judges should consider with an eye toward whether their impartiality might reasonably be questioned given the nature of the contribution.

    - The committee will develop the language to be added to the commentary.

- Add a rule/commentary providing that when a judge is disqualified because of a campaign contribution, the disqualification shall last for a minimum of 2 years from the date the judge took office, or the date of the contribution, whichever is later.

c. Campaign contributions from attorneys

Question presented

Should there be restrictions on contributions from attorneys who appear before a judge candidate?

Discussion

At the April 30 task force meeting, the committee recommended against amending the code or commentary to restrict contributions from attorneys who appear before a judge candidate. Because the task force members did not oppose this recommendation, it was not reconsidered by the committee before the October meeting.

Action

The task force recommends against an amendment to the Code of Judicial Ethics or commentary that restricts campaign contributions from attorneys who appear before a judge candidate.

d. Personal solicitation of campaign contributions

Question presented

Should canon 5 be modified to prohibit judicial candidates from personally soliciting or accepting campaign contributions except through an authorized campaign committee?

Discussion

At the April 30 task force meeting, the committee recommended that canon 5 not be amended to prohibit personal solicitation of campaign contributions because of concerns about the constitutionality and fairness of such an amendment. Because the task force members did not oppose this recommendation, it was not reconsidered by the committee before the October meeting.

Action

The task force recommends against amending canon 5 to prohibit personal solicitation of campaign contributions.

**5. Committee on Slate Mailers, Endorsements, and Misrepresentations**

Judge Stock (committee chair) presented the committee's recommendations.

a. Slate mailers

(1) Question presented

Should the "disclaimer" requirement of Government Code section 84305.5(a)(2) be strengthened, and should a different disclaimer be required if a candidate has been added to a slate without his or her permission?

Discussion

Government Code section 84305.5(a)(2) requires that a notice be placed on slate mailers stating, "Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer."

Some task force members expressed concerns about the constitutionality and practicality of placing restrictions or requirements on organizations that prepare slate mailers. It was noted that in *Unger v. Superior Court* (1984) 37 Cal.3d 612, the Supreme Court held that political parties could not be precluded from endorsing or opposing candidates for nonpartisan office. Therefore, placing restrictions on slate mailers may raise First Amendment issues.

The members discussed amending section 84305.5(a)(2) to explicitly cite to canon 5, which provides that judicial officers do not support or endorse partisan political candidates or causes. Another possible amendment discussed was to require that it be prominently disclosed on the mailer if a candidate is placed on the mailer without giving

prior consent. The members determined that the latter proposed amendment should be worded to apply only to judicial candidates.

An alternative to amending section 84305.5(a)(2) discussed by the members was to add a provision to the canons stating that a judge may only buy his or her way onto a slate mailer if the organization sponsoring the mailer agrees to include a disclaimer indicating that judicial candidates are precluded from supporting other candidates.

The task force members also discussed that section 84305.5(a) by its terms only appears to apply to an "organization or committee primarily formed to support or oppose ballot measures." It was noted that it would be helpful to have the Legislature extend this to organizations formed to support or oppose candidates, but this would likely run into substantial opposition.

Action

The task force makes the following recommendations:

- Amend Government Code section 84305.5(a)(2) to explicitly cite to canon 5 and remind the reader that judicial officers do not support or endorse partisan political candidates or causes. The statute should further be amended to require that when a judicial candidate is placed on the mailer without his or her prior consent, that information should be prominently disclosed.

- Revisit Government Code section 84305.5(a) to determine whether the language limiting its applicability to an "organization or committee primarily formed to support of oppose one or more ballot measures" should be eliminated.

(2) Question presented

Should standards be developed for candidates to follow regarding slate mailers, including when a slate title is misleading?

Discussion

It was noted that developing instructional materials for judicial candidates regarding slate mailers would be helpful. It was also noted that it is not possible to prohibit inclusion of judicial candidates' names on slate mailers or other organizational communications.

The members discussed whether candidates could insist upon inspection of a proposed mailer before agreeing to purchase a place on the mailer. This was viewed as unlikely to be successful. A political consultant contacted by the committee indicated that even if the organization sponsoring the mailer was willing to allow inspection, this would not be workable because the mailers are put together so quickly and are circulated to numerous prospective purchasers. The consultant indicated that the best the candidate could do would be to review the organization's mailer from the previous year.

Action

The task force recommends that instructional material be developed for distribution to judicial candidates that explains the risks associated with slate mailers.

b. Endorsements/partisan associations

(1) Question presented

Should standards be developed for candidates to follow regarding endorsements?

Discussion

The task force members discussed whether a candidate who obtains an endorsement when there is a primary and general election should be required to renew the endorsement for the general election. An alternative discussed was to shift the burden to the endorser to withdraw the endorsement before the general election.

It was noted by a member that the endorsements area is self-regulating; the worst thing that could happen to a candidate during an election is for a purported endorser to say "I didn't give that endorsement."

Action

The task force makes the following recommendations:

- Endorsements from public officials and officeholders should not be regulated.

- Instructional materials should be developed that advise judicial candidates (1) to obtain written permission before using an endorsement and to clarify whether the endorsement is for the primary election, general election, or both; (2) to honor any request, oral or written, to withdraw an endorsement by the person or organization from whom the endorsement is sought; and (3) that as a best practice, the candidate should request written confirmation of any oral request to withdraw an endorsement.

(2) Question presented

Should canon 5 be modified to prohibit judicial candidates from publicly identifying themselves as members of a political organization, running on a slate associated with a political organization, or seeking, accepting or using endorsements from political organizations?

Discussion

The members discussed the meaning of "nonpartisan." It was noted that under the current state of the law this means that there is no party designation on the ballot.

The members discussed whether a candidate should be able to identify himself or herself as a member of a political party. It was noted that there was nothing to prevent this.

The members also discussed whether there was anything that could be done to stress that a judicial candidate is not just another political candidate. The consensus of the members was that it is unclear whether canon 5 could be narrowed to address that issue without violating *White*.

Action

The task force recommends against adoption of any statute, rule, or canon amendment that would prohibit judicial candidates from publicly identifying themselves as members of a political organization, running on a slate associated with a political organization, or seeking, accepting or using endorsements from political organizations. (The final report should explain how the task force arrived at this recommendation.)

c. Misrepresentations

Question presented

Should standards be developed for candidates regarding "truth in advertising" for judicial campaigns, and should the canons be amended to require candidates to review and approve campaign statements and materials produced by campaign committees and supporters?

Discussion

The members discussed whether the canons should be amended to include a list of all prohibited conduct similar to rule 4.1 of the ABA Model Code of Judicial Conduct. The members agreed that there should not be such an amendment to the canons. This issue can be revisited if a list should later evolve.

The members discussed whether the canons should be amended to require candidates to review and approve campaign statements and materials produced by their campaign committees. The members agreed with the concept of requiring review and approval, but felt that this did not necessarily require amending the canons and could possibly be implemented by inclusion in a voluntary oversight commitment document.

A member noted that voluntary campaign standards for candidates may be a useful vehicle. News organizations could be encouraged to agree not to endorse candidates who do not comply with the voluntary standards.

Lastly, the members discussed whether a candidate should have an affirmative duty to disavow misrepresentations made by the candidate's campaign committee or by third parties. A number of members expressed concern about creating an affirmative duty relating to third party misrepresentations. This is an issue that can be dealt with by an oversight committee.

Action

The task force makes the following recommendations:

- Judicial candidates should be required to review and approve all campaign statements and materials produced by the candidate's campaign committee. This can be accomplished either by amending the canons or by including the requirement in a commitment document from a voluntary oversight committee.

- Encourage all candidates to make a voluntary written commitment to the goal of "truth in advertising."

**6. Next steps**

The next meeting of the full task force is scheduled for December 8, 2008. In the interim, telephone conferences will be scheduled to discuss the committee and working group recommendations that were not discussed today.

**Adjournment**

Justice Miller adjourned the meeting at 3:00 p.m.